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CAREER ASSETS AND THE EQUITABLE APPORTIONMENT OF MARITAL PROPERTY*

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I. INTRODUCTION

On June 13, 1986, the legislature amended the South Carolina Code to include provisions for the equitable apportionment of marital property between spouses upon divorce.¹ The task of

* In 1981 the *South Carolina Law Review* published an article on determining property rights upon divorce in South Carolina: Chastain, Henry & Woodside, *Determination of Property Rights upon Divorce in South Carolina: An Exploration and Recommendation*, 33 S.C.L. Rev. 227 (1981). Since that time, there has been substantial development in the area of determination of property rights. It is not the purpose of this undertaking to trace developments in the law since the prior article. For further exploration of those developments, see R. CHASTAIN, *THE LAW OF DOMESTIC RELATIONS IN SOUTH CAROLINA: VOLUME I* (S.C. Bar 1986 & Temp. Supp.). The ferment has led to legislative activity and it is the authors' belief that it is now appropriate to reexamine approaches to evaluating contributions to property accumulation.

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1. S.C. CODE ANN. §§ 20-7-471 to -479 (Supp. 1986). Under these statutes each spouse has an ownership right to marital property, and this ownership right is subject to apportionment by South Carolina family courts. See *id.* § 20-7-471.

The court must consider fourteen specific factors in apportioning marital property. These are as follows:

- (1) Duration of marriage and ages of partners;
- (2) fault;
- (3) value of marital property and contributions thereto by each spouse;
- (4) income and earning potential;
- (5) health;
- (6) need of either spouse for education;
- (7) nonmarital property;
- (8) retirement benefits;
- (9) whether a court has awarded either party alimony;
- (10) treatment of the family home in view of child custody considerations;
- (11) tax consequences;
- (12) any existing support obligations of either spouse,
- (13) debts; and
- (14) child custody arrangements.

equitable apportionment that these provisions assign the family court is a difficult one.² In the authors' view, the appellate courts have increased the difficulty of this task by defining "economic contribution" and "marital property" in ways that are both confusing and excessively narrow. Broader definitions of these terms are necessary to achieve an equitable distribution of marital property and would produce results consistent with those suggested by the factors enumerated in the Article.

The heart of the problem is that courts have not included as contributions those activities that build or maintain nontransferable (and thus nonmarketable) assets. Thus, courts generally have not considered such nontransferable assets as marital property.³ Although most productive activities create assets that have a measurable dollar value, some do not. Consider, for example, activities that increase the value of a person's future labor, such as working toward a college or professional degree, gaining work experience, building a professional reputation, and increasing goodwill and client loyalty. These activities create *career assets*, including college or professional degrees, profes-

See *id.* § 20-7-473(1)-(14).

The statute defines "marital property" as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of litigation . . . regardless of how legal title is held . . ." *Id.* § 20-7-473. The statute also defines nonmarital property, which includes inheritances, gifts from anyone other than the spouse, previously owned property, property acquired after the marriage ends, property excluded by antenuptial agreement, and any increase in value of nonmarital property (except when the other spouse contributes to that increase). *Id.* § 20-7-473(1)-(5).

The court has the authority to use any credible evidence, including government data and expert testimony, to value marital contributions and property. *Id.* § 20-7-474. The court has the authority to take actions necessary to effect its orders, see *id.* §§ 20-7-475, -476, and to "achieve equity between the parties," *id.* § 20-7-476.

2. South Carolina courts are not alone in this task. Although their laws differ in some respects, at least 40 other jurisdictions can be considered equitable distribution jurisdictions. See Freed & Walker, *Family Law in the Fifty States: An Overview*, 19 FAM. L.Q. 331, 354-60 (1986). The remaining nine are community property jurisdictions, which divide property acquired during a marriage according to various regimes, many of which are very similar to the division approaches in equitable division states. *Id.* at 353-56. Commentators have discussed this matter extensively. See, e.g., Freed & Walker, *supra*, at 353-67.

3. See Chastain, Henry & Woodside, *Determination of Property Rights upon Divorce in South Carolina: An Exploration and Recommendation*, 33 S.C.L. Rev. 227 (1981). That article provides a comprehensive review of the treatment of contributions and marital property in the South Carolina courts. The authors will discuss some changes in South Carolina law that have occurred since the article's publication in 1981.

sional licenses, work experience, employer or client loyalty and goodwill, and profit-sharing and pension programs.⁴ These assets are the focus of current controversy in divorce settlements and in the legal literature on divorce.⁵ Each of these assets, either legally or factually, is nontransferable, but each has value to its owner. If the asset has value, there should be some way of recognizing that value in the context of marriage dissolution. The literature recognizes this, but frequently gives superficial treatment to the problem.⁶

The equitable apportionment statute does not state whether courts should include career assets as marital property. The statute, however, seems to include as marital property the particular "career asset" known as pension rights.⁷ Furthermore, the court of appeals has recognized that there are problems with

4. Economists have long used the term "human capital" to refer to knowledge and skills acquired through education, training, or on-the-job experience, which increase the worker's productive capacity. Lenore Weitzman first used the term "career assets" to refer to "tangible and intangible assets that are acquired as a part of either spouse's career or career potential . . . such as pension and retirement benefits, a license to practice a profession or trade, medical and hospital insurance, the goodwill of a business, and entitlements to company goods and services" L. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 110 (1985). Career assets, as she defines them, constitute either an increased earnings capacity because of the accumulation of human capital or fringe benefits provided by employee or employer contributions.

5. This is true both in South Carolina and in other states. Media reports of this controversy appear in Adler & Stadtman, *Dividing Degrees*, *NEWSWEEK*, Jan. 6, 1986, at 61; Chase, *Single Trouble*, *Wall St. J.*, Jan. 21, 1985, at 1, col. 1; Winter, *Divorcing Couples Increasingly Squabble over the Allocation of Pension Benefits*, *Wall St. J.*, Sept. 26, 1985, at 33, col. 3.

6. For example, one author simply states as follows: "Although lawyers are ethically precluded from selling their law practices, a professional practice, like any other business, is eligible for equitable distribution in divorce proceedings in many states. The question is how to appraise its value." Skoloff, *The Value of a Law Practice in a Divorce*, 73 A.B.A. J., Mar. 15, 1987, at 38.

7. South Carolina courts have held under prior law that particular career assets do not constitute marital property. As recently as June 30, 1986, the South Carolina Supreme Court held that the husband's medical degree was not marital property subject to equitable distribution. *Helm v. Helm*, 289 S.C. 169, 173, 345 S.E.2d 720, 722 (1986). This is consonant with the general approach to this issue around the country. *But see* O'Brien v. O'Brien, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1986). In *Johnson v. Johnson*, 288 S.C. 270, 275, 341 S.E.2d 811, 814 (Ct. App. 1986), the court of appeals held that "a spouse's non-contributory retirement account is not marital property subject to equitable distribution. . . . Furthermore, the court should not consider the value of either party's retirement plan in dividing the marital estate." *Id.* (citations omitted). *See generally* R. CHASTAIN, *THE LAW OF DOMESTIC RELATIONS IN SOUTH CAROLINA: VOLUME I* 38-40 (S.C. Bar Temp. Supp. 1986).

a strict, formulaic approach. In *Watson v. Watson*⁸ that court affirmed in relevant part the family court judge's decision that the expert valuation of the wife's homemaker direct and indirect contributions (based essentially on the minimum hourly wage) was not adequate. The court of appeals properly wrote:

The trial judge rejected the expert's valuation of her contributions, noting:

[T]he court is inclined to disagree with the minimum wage value placed upon the [wife's] indirect contributions under the facts of the case. Also, the number of hours attributable to each party for having [sic] and rearing the children cannot be measured to a mathematical certainty. The support of the wife during the marriage when the [husband] was drinking, gambling, having periods of depression and threatening suicide cannot be valued in hours. Her concern for his drinking problem and instigation of the planned intervention by herself and Dr. Watson's friends to cause [him] to stop drinking cannot be valued quantitatively to a mathematical certainty. This was a marriage of some twenty-three years and ends with the wife being denied alimony or support. This is a marriage where the husband's ability to earn is vastly superior to that of the wife, and the longer the parties are married, the smaller the wife's percentage of direct monetary contributions would be.

The wife's expert testified that it was difficult to place a value on a spouse's indirect contributions to a mathematical certainty. He did not value the wife's contributions. A family court judge has wide discretion to distribute marital property in any equitable manner. His judgment will not be disturbed absent an abuse of discretion. However, "[t]he amount of property awarded to the wife should bear a reasonable relationship to her contributions toward the acquisition of the property or the financial and material success of the family."⁹

The problem was a simple one: in light of the expert testimony, it did not seem fair to the family court judge, or to the judges on the court of appeals, to distribute the property in the manner dictated by the conventional formulas. Under the tradi-

8. 291 S.C. 13, 351 S.E.2d 883 (Ct. App. 1986).

9. *Id.* at 19-20, 351 S.E.2d at 887-88 (citations omitted).

tional approaches, the best the wife's attorney could do was to find an expert who would agree that the property distribution was not fair and who would not put a dollar figure on the wife's contribution, in hopes that the family court judge would be sympathetic and give her a more substantial distribution based on subjective factors. Ms. Watson's success both at trial and on appeal suggests that the court of appeals and the family court are willing to use subjective factors in achieving equitable divisions of marital property. The authors believe they can show that the *Watson* court's approach was wise and correct under objective criteria, which that court did not articulate. Courts can use these objective criteria to achieve a greater predictability in the law in this area. In brief, the courts in *Watson* were attempting to give weight to the effect that numerous nonmarket activities and assets have on a long-term marriage. Although the experts had not expressly factored in these activities and assets, they must have had some part in the court's decisions.

The authors intend to show how one can value these nonmarketable activities and assets and include them within the relative contributions framework. The authors will also explain why this must be done if the goal of the judicial system and our society is equitable apportionment. We will demonstrate the use of this framework in complicated and controversial marital circumstances, showing how it takes into account the specific factors listed in the equitable apportionment statute.¹⁰ In particular, the authors will demonstrate the appropriate way to handle marriages in which one spouse supports another while the latter goes through college or professional training and long-term marriages involving more traditional spousal roles.¹¹

II. CAREER ASSETS: A MAJOR CAUSE OF INEQUITABLE SETTLEMENTS

When a husband and wife assume the traditional male and female roles in a marriage, the husband builds both transferable and nontransferable assets during the marriage. His salary helps to buy tangible assets, such as cars and refrigerators, but his ef-

10. See *supra* note 1.

11. In this Article, the authors will refer to these as "put-spouse-through-school" marriages.

forts also yield career assets. The marriage may have no significant effect on the rate of his accumulation of career assets, or it may slow down the accumulation of these assets.¹²

The woman who works in the home provides services that the couple would otherwise purchase or do without, but she accumulates no career assets. In fact, any career assets she does possess almost certainly depreciate in value over time. South Carolina divorce settlements, however, now partially recognize the contributions of a homemaker spouse by attaching economic value to household duties. Economists testifying in court traditionally value each hour spent on a household chore or in child care in one or more of the following ways: Minimum wage, the cost of hiring someone to do the task, and the hourly wage that the woman could earn in the labor market (the opportunity cost approach).¹³ If the economist presents more than one method, the judge can choose the one he prefers or some average of the estimates presented. None of the three approaches, however, takes into account the depreciation of career assets incurred by the woman who remains out of the labor force.

These traditional roles change when the woman works (even if only temporarily) to support the family while the husband gains a college or professional education. At first glance, it might seem that in this situation the woman also would be gaining career assets, so that divorce would yield no inequities. Often, however, this is not so. The wife may postpone her educational goals to work in a job requiring little skill and with no prospect of significant advancement in order to devote the family's financial resources to the husband's education. This slows down her own accumulation of career assets while accelerating her hus-

12. Cf. *Eagerton v. Eagerton*, 285 S.C. 279, 282, 328 S.E.2d 912, 914 (Ct. App. 1985) ("[T]he record discloses the wife to have been a spendthrift, a person addicted to excessive medication, who slept until about noon each day and made no meaningful contribution to either the marriage or the acquisition of property by the husband."). This implies that the husband's efforts to maintain not only his traditional "role" in the marriage but the wife's "role," as well, may have impeded the accumulation of career assets.

Of course, it is possible that a marriage may cause the husband to lose transferable and nontransferable assets. Trouble in a marriage can adversely affect work or school performance, and borrowing to maintain an inflated lifestyle to please a demanding or greedy spouse can reduce net equity. Any system purporting to be "fair" must evaluate all of these factors.

13. For a discussion of the three methods, see Chastain, Henry & Woodside, *supra* note 3, at 250-53.

band's career growth. Her decision to take this course may be rational if she expects to share in his increased earnings.

The important point is that differing rates of accumulation of career assets for the husband and wife are likely to occur when the couple assumes traditional sex roles within the marriage or when one spouse puts the other through school. The traditional divorce settlement, however, does not even acknowledge the existence of career assets, much less evaluate their worth for equitable settlement.

Traditionally, alimony has been the law's vehicle for compensating for the sacrifices of those spouses who can earn less. In *Miller v. Miller*,¹⁴ for instance, the court pointed out that courts should consider the destruction of income opportunities as a factor in setting alimony awards.¹⁵ Because the law terminates alimony awards upon the divorcee's remarriage, it obviously does not view alimony as earned and just compensation for the woman's contribution to the marriage and her husband's career, nor does it recognize the career assets she sacrificed in becoming a homemaker. Instead, the law views alimony as the husband's fulfillment of a social obligation not to leave his wife without some means of support, whether a job or a new husband.¹⁶

Over the years, alimony has served to moderate some of the most serious inequities wrought by the courts' refusal to recognize explicitly the existence and importance of career assets in

14. 225 S.C. 274, 82 S.E.2d 119 (1954).

15. *Id.* at 283, 82 S.E.2d at 123. In South Carolina, factors to be considered in determining whether alimony should be awarded are as follows:

(1) [T]he financial condition of the husband and the needs of the wife, (2) the age and health of the parties, their respective earning capacity, their individual wealth, (3) the wife's contribution to the accumulation of their joint wealth, (4) the conduct of the parties, (5) the respective necessities of the parties, (6) the standard of living of the wife at the time of the divorce, (7) the duration of the marriage, (8) the ability of the husband to pay alimony, and (9) the actual incomes of the parties.

Lide v. Lide, 277 S.C. 155, 157, 283 S.E.2d 832, 833 (1981).

Weitzman cites United States Census Bureau data which indicate that only 14% of divorced women are awarded alimony and notes that her studies of California divorces yield a similar result. L. WEITZMAN, *supra* note 4, at 144. Thus, alimony awards are the exception rather than the rule in the country as a whole. Although statistical data that pertains only to South Carolina is not available, there is some evidence that indicates that alimony is awarded more frequently here than in most states.

16. See *Nienow v. Nienow*, 268 S.C. 161, 232 S.E.2d 504 (1977); *McNaughton v. McNaughton*, 258 S.C. 554, 189 S.E.2d 820 (1972).

equitable divorce settlements. For this reason, it has been very important to women, despite the restriction on their freedom to marry that it entails. If, however, the courts choose to recognize career assets as marital property, alimony would arguably be rendered obsolete as unnecessary.¹⁷ In place of alimony and in addition to the wife's share of marketable assets, courts could award lump-sum or structured payments to the wife, which would reflect her equitable share of career assets.

III THE COURTS' RELUCTANCE TO RECOGNIZE CAREER ASSETS

Courts in South Carolina—and in the rest of the nation—have been slow to recognize career assets as marital property. Within the last five or six years, however, a trend in that direction has begun to emerge.¹⁸

17. See, e.g., R. CHASTAIN, *THE LAW OF DOMESTIC RELATIONS IN SOUTH CAROLINA: VOLUME I* 50-51 (S.C. Bar 1986) (pointing out that there is no obvious theoretical justification for an award of alimony under the present legal system). Assuming that the theoretical justification for alimony is that marriage involves support, adoption of the ideas espoused here would lead logically to an abolition of permanent alimony in favor of payments on the property distribution. There probably would be substantial tax consequences to all this.

Of course, some situations may require monthly support or maintenance payments between the date of separation and the date of execution of the divorce settlement or the filing of the decree, but no such payments would be required thereafter.

Obviously, the court system could adopt the analytical portion of the proposal discussed here without the assistance of the legislature, and the courts could make their determinations on alimony accordingly. Legislative activity, however, would seem more desirable.

18. The South Carolina Court of Appeals took a significant step toward recognizing career assets as marital property in *Bannen v. Bannen*, 286 S.C. 24, 331 S.E.2d 379 (Ct. App. 1985). It held that "in an action such as this, in which an equitable division is appropriate but distribution of an interest in a professional association would be contrary to law, the court, in lieu of granting the wife an interest in the professional association, should consider its value in valuing the marital estate and then make a distributive award equivalent to the wife's equity in the professional association from other assets of the marital estate." *Id.* at 28, 331 S.E.2d at 381. *But see supra* note 7 (discussion of *Helm*). The South Carolina courts' disparate treatment of career assets has created a great deal of uncertainty in this area of the law. If the legal system is to provide predictability in this area, resolution of this issue is necessary.

The problem is not limited to South Carolina. See, e.g., *O'Brien v. O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1986); see also L. WEITZMAN, *supra* note 4, at 113-39. In *O'Brien* the Court of Appeals of New York held a medical license to be "marital property" for purposes of the domestic relations law of that state. 66 N.Y.2d at 584, 489 N.E.2d at 715, 498 N.Y.S.2d at 746. The trend is a very gradual one, however, with inadequate recognition of career assets still the rule rather than the exception.

Why have the courts not accepted the existence and worth of career assets as marital property? A review of the court decisions reveals several reasons. First, attorneys who sought to have career assets classified as marital property generally failed to use the term "career assets" or the concept of human capital in their argument. As a result, the courts have looked at goodwill, educational degrees, professional licenses and practices, and pensions as conceptually independent and unrelated items incapable of being classified as a divisible property.¹⁹ If, instead, the court considered one partner's role in determining the future earning capacity of the other partner, they might recognize the need to define marital property to include increases in earning capacities by either spouse during the marriage and to distribute marketable assets fairly.²⁰

Second, even when courts have been inclined to recognize the existence of some career asset, deciding the equitable share for each partner has been a problem. Courts typically have given career assets special treatment, rather than including them, along with tangible assets, as a part of a comprehensive property settlement. In the same manner, they have separated a spouse's contribution to career assets from that spouse's other contributions for purposes of determining shares. This unnecessary and unjustified distinction between the handling of transferable and nontransferable assets has muddled the water for the courts.²¹

19. In *Helm v. Helm*, 289 S.C. 169, 171, 345 S.E.2d 720, 721 (1986), the South Carolina Supreme Court held that a professional degree is a "personal intellectual attainment, not marital property." In *Casey v. Casey*, 289 S.C. 462, 346 S.E.2d 726 (Ct. App. 1986), cert. granted, 291 S.C. 284, 353 S.E.2d 287 (1987), the South Carolina Court of Appeals held that goodwill of a sole proprietorship may be divisible marital property under the proper circumstances.

Recognition of career assets as marital property is by no means unanimous among the states. See Krauskopf, *Marital Property at Marriage Dissolution*, 43 Mo. L. Rev. 157, 169 (1978) (noting that "recognition, valuation, and division of 'professional goodwill' as an asset has been more common than recognition of earning capacity").

20. The court in *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978), took precisely this view. It stated, "[I]t is the potential for increase in future earning capacity made possible by the law degree and certificate of admission conferred upon the husband with the aid of his wife's efforts which constitutes the asset for distribution by the court." *Id.* at 891. The South Carolina Supreme Court in *Helm* declined to address this issue because it had not been raised in the trial court. See *Helm v. Helm*, 289 S.C. 169, 171-72, 345 S.E.2d 720, 721 (1986).

21. The court in *Bannen v. Bannen*, 286 S.C. 24, 331 S.E.2d 379 (Ct. App. 1985), viewed the husband's medical practice separately from other assets. It was only because the wife had contributed *directly* to the practice as an "unpaid secretary, receptionist,

Third, and perhaps most important, is a reluctance of the courts to deal with assets whose values are not readily apparent. Courts have focused on the difficulties associated with assigning dollar values to nonmarketable career assets. Some refuse to include any career assets whose values depend upon the survival and continued work effort of a spouse as marital property because of their uncertain nature.²² It is hardly equitable, however, to ignore an asset simply because its value is difficult to compute or is subject to change. Some courts apparently agree and have struggled with the valuation of career assets as marital property, despite the uncertainty and computational complexities.²³

Although accountants and attorneys usually have been the professionals who value marketable marital assets, the courts and parties should leave the valuation of career assets to economists. When personal injury or wrongful death cases require the projection of earnings capacities or change therein, the courts currently recognize the expertise of economists. These calculations are precisely those involved in the valuation of career assets.

IV. A COMPREHENSIVE FRAMEWORK FOR HANDLING CAREER ASSETS

Given the facts of a particular domestic case, how should economists report to the court regarding the equitable division of marital property? Table 1 below presents the traditional

and bookkeeper for sixteen years" that she was "entitled to a special equity in her husband's interest in the business." *Id.* at 27, 331 S.E.2d at 381.

Bannen indicates that South Carolina still recognizes the special equity doctrine. See Chastain, Henry & Woodside, *supra* note 3, at 234-240. This Article does not address the question whether the doctrine still performs a genuinely useful function. For present purposes, the differences between special equity and equitable distribution analyses do not pose any substitute problems in the valuation area.

22. For court decisions that note the speculative nature of career asset valuations and other valuation difficulties, see, e.g., *DeWitt v. DeWitt*, 98 Wis. 2d 44, 296 N.W.2d 761 (Ct. App. 1980), and cases cited in Note, *Domestic Relations: Consideration of Enhanced Earning Capacity of Recently Educated Spouse in Divorce Settlements*, 17 SURFOLK U.L. REV. 901, 905 n.22 (1983), and Comment, *Family Law—Reimbursement Alimony*, 14 RUTGERS L.J. 1011, 1015 n.25 (1983).

23. See *O'Brien v. O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985); *Lundberg v. Lundberg*, 107 Wis. 2d 1, 318 N.W.2d 918 (1982); Note, *Valuation of Spousal Interest in a Professional Practice for Equitable Distribution: Hirschfeld v. Hirschfeld*, 17 U. RICH L. REV. 387 (1983).

framework used by economists.²⁴ Although the numerical entries in the table are hypothetical, they are consistent with a traditional marriage in which the husband is the wage earner and the wife stays home to perform household duties, child care duties, or both. The underlying concept of equity is one that views marriage as an economic partnership. Upon dissolution of the marriage, courts should allocate the property of the partnership according to the parties' relative contributions towards its accumulation.

TABLE 1²⁵
ANALYSIS OF ECONOMIC CONTRIBUTIONS FOR PURPOSES
OF EQUITABLE DISTRIBUTION

	ECONOMIC CONTRIBUTIONS	
	WIFE	HUSBAND
Direct contributions (present value)	\$0	\$100,000
Indirect contributions (present value)	\$70,000	10,000
Total contributions	<u>\$70,000</u>	<u>\$110,000</u>

RELATIVE CONTRIBUTIONS
 $\$70,000/\$180,000 = 38.89\%$ $\$110,000/\$180,000 = 61.11\%$

MARITAL PROPERTY
Total present value of (marketable) assets less liabilities = \$50,000

EQUITABLE DISTRIBUTION OF PROPERTY
 $38.89\% \text{ OF } \$50,000 = \$19,445$ $61.11\% \text{ OF } \$50,000 = \$30,555$

Direct contributions include wages or other earnings by each party, and indirect contributions comprise the value of household duties. Courts have included any marketable assets (other than individual inheritances and assets owned prior to marriage that a spouse has not comingled with marital assets) in marital property. Because the courts have refused to recognize career as-

24. Chastain, Henry & Woodside, *supra* note 3, at 255-60.
25. Entries in this table are defined and discussed *id.* at 248-55.

sets, as defined herein, as marital property, they ignore those assets in property distributions.

The framework can be expanded, however, to account for career asset accumulation by the husband and wife.²⁶ Table 2 shows the necessary modifications.²⁷ Courts must broaden the definition of direct contributions and add “career assets accumulated” and “career assets foregone” entries.

TABLE 2

ANALYSIS OF ECONOMIC CONTRIBUTIONS FOR PURPOSES OF EQUITABLE DISTRIBUTION, CAREER ASSETS INCLUDED

ECONOMIC CONTRIBUTIONS		
WIFE		HUSBAND
*Direct contributions (present value)	\$0	(\$100,000-\$10,000)=\$90,000
**Career assets accumulated (present value)	\$0	\$80,000
Indirect contributions (present value)	\$70,000	\$10,000
**Career assets foregone (present value)	<u>\$90,000</u>	<u>\$0</u>
Total contributions (present value)	<u>\$160,000</u>	<u>\$180,000</u>

26. For a summary of methods the commentators have proposed to calculate appreciation and depreciation of career assets during marriage, see Beninger & Smith, *Career Opportunity Cost: A Factor in Spousal Support Determination*, 16 FAM. L.Q. 201, 212-17 (1932). Though some of the methods rely on the sort of analysis presented here, none of these approaches constitutes a complete and satisfactory method for incorporating career asset considerations into property settlements in equitable distribution states.

27. The numerical entries in table 2 are from the same hypothetical situation as in table 1, a traditional male breadwinner, female homemaker marriage.

RELATIVE CONTRIBUTIONS

\$160,000/\$340,000 = 47.06%

\$180,000/\$340,000 = 52.94%

MARITAL PROPERTY

Total present value of marketable assets less liabilities = \$50,000

**Total present value of career assets accumulated = \$80,000

Total value of marital property = \$130,000

EQUITABLE DISTRIBUTION OF MARITAL PROPERTY

47.06% OF \$130,000 = \$61,178

52.94% OF \$130,000 = \$68,822

* indicates that the definition of an entry differs in table 1.

** indicates an entry not included in table 1.

A comparison of tables 1 and 2 shows that the modifications to account for career assets can have a substantial impact on the equitable distribution indicated. The wife, under table 1, would receive a settlement worth \$19,445. Under table 2 her equitable share rises to \$61,178. The husband's settlement decreases from \$110,555 (\$30,555 in marketable assets plus his career asset accumulation of \$80,000) to a total award of \$68,822. The family court may not be able to take any of his \$80,000 career asset away from him, but it can require him to make payments to the wife totaling \$11,178 (\$80,000-\$68,822) in present value. This would accomplish the settlement indicated by table 2.

A. *Direct Contributions Redefined*

Because the entries in table 2 can have such a large impact on the parties, it is important to understand their precise meaning and to know how to calculate their dollar value in any given case. First, we will discuss the modifications that must be made to the definition of direct contributions.

Traditionally, direct contributions have included the spouse's earnings from employment and funds from any other source made available by the spouse for use by the family. The authors propose, however, that two changes to this definition are necessary. First, earnings should include the value of *all* fringe

benefits received by a spouse during the marriage, even those paid for by the employer. Fringe benefits are wage substitutes and should count as contributions by the party earning them. Second, any expenses a spouse incurred in producing his or her direct contributions must be subtracted from them. This includes the costs of education required to increase a spouse's earnings. For example, a student's direct contribution to the marriage consists of his earnings less his direct educational expenses (*i.e.*, tuition and books). This usually will yield a negative direct contributions figure for the full-time student. A positive "career asset accumulation" entry, however, would still render his total contribution positive.

B. Career Assets Accumulated

Unfortunately, the "career assets accumulated" entry under the contributions and marital property sections of table 2 may not be so straightforward. This figure should be the present value of any increase in real earnings capacity²⁸ experienced during the marriage, which will be reflected in higher earnings following termination of the marriage.

It is important to stress two points here. First, career assets owned prior to marriage constitute neither contributions to the marriage nor marital property. They are rightfully the property of the party having title to them, as are tangible assets owned prior to the marriage and kept separate during the marriage. Second, if a partner sells career assets during the marriage, his direct contributions reflect their accumulation as higher earnings and they do not constitute marital assets at the termination of the marriage. Therefore, to avoid double counting, a court should count only unspent career assets in the accumulated career assets entries.

Career assets may accumulate during marriage for either of two reasons. First, the simple passage of time during the marriage may allow for the creation of career assets. Satisfactory participation in the labor force over the marriage years usually results in the worker's accumulation of career assets. Work experience itself improves job skills and employer and customer loy-

28. As mentioned earlier, we suggest defining real earnings capacity broadly to include the value of fringe benefits as part of earnings.

alty and goodwill. These assets, in turn, will result in higher earnings capacities, which include such wage substitutes as retirement and profit-sharing plans. Similarly, a student spouse performing satisfactorily in school will accumulate career assets, such as an education, a professional degree or a license. Second, certain terms of the marital agreement may enhance a partner's career asset accumulation. Receiving publicity and generating controversy in recent years is the situation in which the wife puts a husband through a professional degree program, thereby enhancing his earning capacity. He might have been unable to afford the education without her contribution, or financial constraints may have delayed his progress. Of course, she might not have contributed to his progress, in which case she has not contributed to the accumulation of the asset. That is a matter for factual proof at a hearing before the family court.

C. *Career Assets Foregone*

The second new entry in table 2 is "career assets foregone." This figure should be the present value of any increases in earnings capacity that would have been reflected in higher earnings after the termination of the marriage had they not been given up for the sake of marital commitments. Remember that this concept is not a new one, although this treatment of it is different than that undertaken before.²⁹ The court should account for foregone career asset accumulation in valuing indirect contributions during the marriage by using the opportunity cost approach. In other words, the hourly wage that courts employ to value a spouse's household and child care duties should increase to reflect the earnings capacity she would have had if she had remained in the labor force.

No "career assets foregone" figure appears in the marital property section because no career assets exist at the termination of the marriage if their creation is foregone during the marriage. Career assets may be foregone during marriage in either of two ways: A partner may continue educational or employment efforts while accepting lower earnings because of some marital commitment, or a partner may terminate career efforts com-

29. See generally Chastain, Henry & Woodside, *supra* note 3.

pletely for the sake of marital commitments.

D. Valuation of Accumulated or Foregone Career Assets

Valuing career assets that a spouse has either accumulated or foregone during a marriage requires analysis of three “earnings paths.”

Path 1

Path 1 is the actual career path a spouse follows. It projects real earnings (adjusted for inflation) through the end of the individual’s life expectancy. In calculating real earnings, it is important to include fringe benefits which are a substitute for wages and a part of the worker’s salary, and not to subtract payments by the employee for various benefit programs, whether voluntary or mandatory. Since the costs of fringe benefits usually reflect actuarial statistics, the best approach to valuing these benefits is to determine their total annual cost. To avoid double counting, however, do not include employer or employee costs for profit-sharing or pension plans under direct contributions. Include the income from such plans instead. If a spouse has not received that income by the termination of the marriage, the “career assets accumulated” entry will reflect it.³⁰

30. South Carolina courts have refused to recognize noncontributory retirement accounts as marital property. See *Anderson v. Anderson*, 282 S.C. 162, 318 S.E.2d 566 (1984); *Haynes v. Haynes*, 279 S.C. 162, 303 S.E.2d 429 (1983); *Johnson v. Johnson*, 288 S.C. 270, 341 S.E.2d 811 (Ct. App. 1986). In *Watson v. Watson*, 291 S.C. 13, 351 S.E.2d 883 (Ct. App. 1986), the court of appeals noted that certain *contributory* retirement plans should be viewed as marital property if an evaluation of the following factors indicated it to be appropriate:

- (1) [W]hether the pension plan is mandatory for all employees of the spouse’s employer; (2) whether the spouse has control over the amount of funds placed in the plan; (3) whether funds in the plan are vested; (4) whether the funds are readily accessible to the spouse; (5) whether the spouse has control over the plan’s investments; (6) whether the spouse has personally dealt with the plan, *i.e.*, lent it money or borrowed from it; (7) whether a third party makes independent judgments regarding the spouse’s dealings with the plan on such matters as loans from the plan or the use of its property; (8) whether the spouse uses assets of the plan without adequate compensation for their use; and (9) whether the plan meets the requirements of a qualified plan under provision [sic] of the Federal Internal Revenue Code.

Id. at 18-19, 351 S.E.2d at 887. The court in *Watson* also noted that the new equitable apportionment statute, S.C. CODE ANN. §§ 20-7-471 to -479 (Supp. 1986), apparently

In order to include impacts on a spouse's retirement income, it is important to project his earning capacity not merely through the end of his worklife expectancy, but through the end of his life expectancy. If a marriage is very short lived, however, post-worklife impacts may be insignificant and not worth considering. For consistency, do not adjust real earnings for personal income taxes due. Other contributions will be on a before-tax basis.³¹

Drawing the actual real earnings path requires only that the economist have access to the individual's past income data. Reasonable projections of future earnings will be somewhat more complex. If an individual has remained in the labor force during the marriage, a past earnings history (supplemented perhaps with employer evaluations, industry data, and information on the company profit-sharing and pension plans) should be adequate for the task. Of course, projections will be more tentative when a spouse, traditionally, the wife, has not worked for some time. A lapse in time between separation and divorce may aid in making the projection by allowing the woman an opportunity to determine her employment options and possibly even to accept employment. Her acceptance of the best offer would make it clear what her real earning capacity is at the termination of the marriage.

In some cases, particularly those involving short-lived marriages, a spouse's best option at the termination of the marriage will be to return to school.³² The appropriate method for projecting future real earnings is the one that uses the highest realistic appraisal of total earnings through the end of the wife's life expectancy. The method assumes that the spouse will take advantage of her best career options, given her age and capabilities and other relevant factors.³³

makes all plans, either contributory or noncontributory, distributable as marital property.

Again, this Article suggests ways to *measure* the spouse's relative contributions to the accumulation of divisible marital property. As the initial tables and previous discussion indicate, nothing in the statute that addresses what property is divisible is inconsistent with the concepts set forth here.

31. Chastain, Henry & Woodside, *supra* note 3, at 250.

32. An equitable property settlement that recognizes career assets as marital property should provide adequate funding for this in most instances.

33. Weitzman notes the importance of career counseling to the woman who is unaware of her career options and who seeks to reenter the labor force. See L. WEITZMAN,

Path 2

Path 2 is the career (or real earnings) path that a spouse would have followed had the marriage never occurred. This might be called the “single” path. If the circumstances of the marriage did not alter significantly the partner’s career path, paths 1 and 2 will be the same. If path 1 is above path 2, the marriage enhanced the partner’s career. If path 1 is below path 2, marital obligations or commitments hindered career progress.

Path 3

Path 3 is path 2 without the years of the marriage included. This path provides a benchmark by showing the career path that a spouse would have taken had she neither accumulated nor lost any career assets during the marriage. Stated another way, path 3 sets the individual’s real earnings capacity at the termination of the marriage equal to that at the inception of the marriage. It then projects growth from that point as if the marriage had never occurred.

Path 3 assumes that any increase in real wages over time is a reflection of the buildup by the individual of career assets (human capital). This projection would not be an exact lagged copy of the projection in path 2 above if, over time, technology or market conditions in the individual’s field of employment altered the real wage of employees within a given level of education, experience, and skill. Increases in real wages over time for a particular employee may reflect human capital growth, technological change in the industry, or altered product or labor market conditions. If either of the latter changes is significant over the years of the marriage, one can examine median earnings in the individual’s occupation. Assuming no significant changes in employment criteria, any increases in median earnings will reflect either altered market conditions, technological change, or both. A proper projection of future earnings would take into account a rise in median earnings in the individual’s field of employment over the years of the marriage.

Once these three earnings paths are drawn for an individual, one can determine his or her career asset accumulation, sacrifice,

supra note 4, at 207.

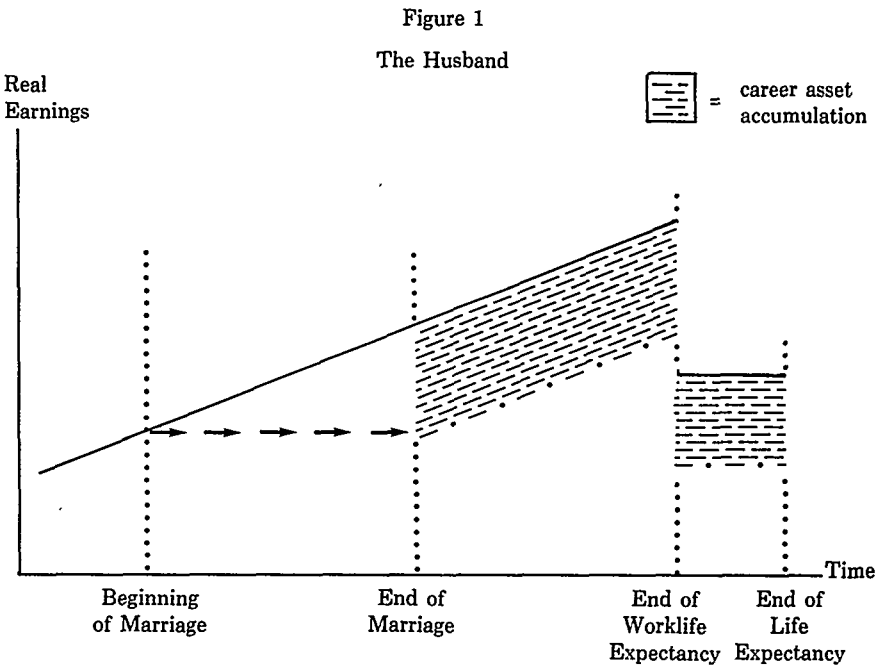
or both by computing the present value of certain gaps between those paths. The following hypothetical cases present the type of analysis required for most any marital situations.³⁴

E. Example Cases

Case 1: The Traditional Marriage—Husband as Breadwinner, Wife as Homemaker

KEY: — = actual real earnings path (path 1)
 - - - = real earnings path without marriage (path 2)
 - · - · = real earnings path, marriage years removed (path 3)

Note: Dotted lines mark critical points in time — the date of marriage, the end of the marriage, the end of worklife expectancy, and the end of life expectancy.



34. All of the illustrated career paths are linear, but our analysis does not depend on such an assumption. In fact, earnings paths are more likely to be nonlinear.

Figure 1 shows that the husband's career is neither enhanced nor hindered by the marriage: paths 1 and 2 are identical. The only impact of the marriage on his accumulation of career asset comes through the passage of time. Therefore, one can describe his buildup of career assets as the present value of the gap between paths 1 and 3 following termination of the marriage up through the end of his life expectancy. That part of career asset accumulation which is reflected in higher earnings during the marriage is counted in direct contributions and should not be included here.

KEY: — = actual real earnings path (path 1)
- - - = real earnings path without marriage (path 2)
- · - · = real earnings path, marriage years removed (path 3)

Note: Dotted lines mark critical points in time — the date of marriage, the end of the marriage, the end of worklife expectancy, the end of life expectancy.

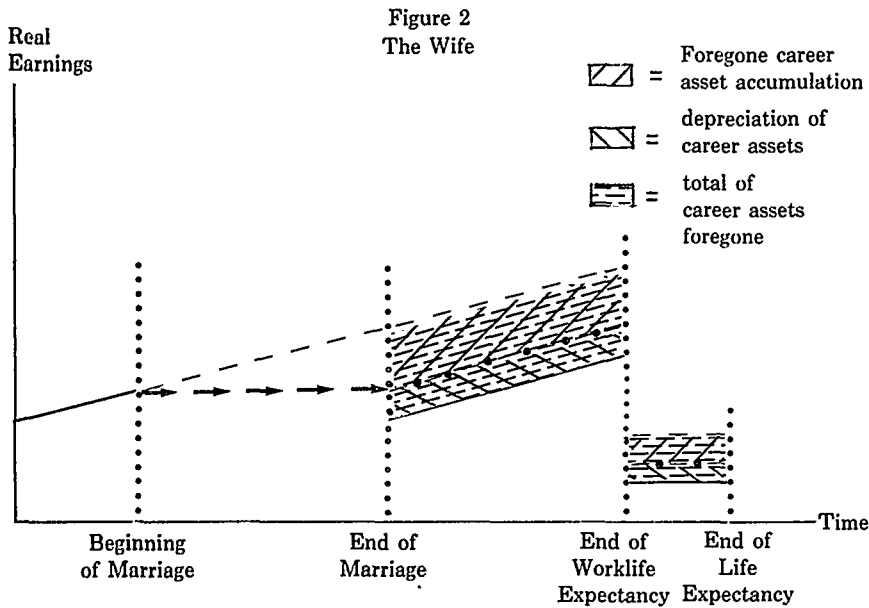


Figure 2 shows that the wife was pursuing her career up until the marriage and would have continued along path 2 had she remained single. Upon marriage, she and her husband agreed that she should terminate her professional pursuits to devote her time and energy to household duties, childcare duties, or both. Consequently, her real earnings during marriage drop to zero. Upon termination of the marriage, she seeks employment in her former field, but finds that her real wage will be even lower than it was when she left the labor force.

The gap between paths 2 and 3 from the end of the marriage to the end of her life expectancy shows the buildup of career assets she sacrificed by removing herself from the work force. Her indirect contribution figure should reflect what would have happened to her earnings *during* the marriage. This will occur when the opportunity cost approach to valuing household duties is used properly.

The gap between paths 1 and 3 shows that she not only forewent the buildup of her career assets, but she also experienced an actual depreciation of the career assets which she held at the time of marriage.

It is apparent from table 2 how the foregone career assets enter the analysis. But what about the depreciation of the career assets that she possessed at the time of her marriage? One might argue that the dollar value of the career assets that she brought into the marriage should be restored to her from the pool of marketable assets prior to considering equitable division of the marital property. When the couple use tangible assets that one spouse brings to the marriage, the courts generally have not seen fit to compensate that spouse in full from the pool of marital assets.³⁵ Instead, courts simply have included their value as a contribution to the marriage. Accordingly, they include them in the relative contribution figures they use to determine the settlement. Hence, consistency requires that the depreciation of career assets be ignored in valuing marital property, but included in the category of "career assets foregone" as a contribution to

35. See, e.g., *Cooper v. Cooper*, 289 S.C. 377, 346 S.E.2d 326 (Ct. App. 1986) (inherited land lost nonmarital character when used for marital home); *Domestic Relations, Annual Survey of South Carolina Law*, 37 S.C.L. Rev. 126 (1985) (examining the court of appeals' decision in *Hussey v. Hussey*, 280 S.C. 418, 312 S.E.2d 267 (Ct. App. 1984), in which the court held that inherited property is not marital property).

the marriage.

We can combine the above calculations in the modified framework (table 2) to summarize the impact of recognizing career assets in a traditional marriage. The wife's total contributions rise when one includes "career assets foregone." The husband's contributions rise when one adds "career assets accumulated." The relative contributions of the two parties change. The direction of change for the wife may be positive or negative depending upon the particular situation. The total size of marital property increases by the amount of the husband's career asset accumulation. The value of the wife's equitable settlement is larger.

1. *A Special Note About Pension Plans*

Since the husband's profit-sharing and pension plans may have increased in value by sizable amounts during a long-term, traditional marriage, it is important to note how we account for them in this framework. First, the husband's contributions include any buildup of his profit-sharing or pension plans. If the husband receives income from the buildup of these plans during the marriage, it becomes part of his direct contribution to the marriage. The income that he will not receive until after the termination of the marriage, however, becomes a part of his career asset accumulation. Second, marital property also includes, as a part of "career assets accumulated," the present value of any income from the buildup of profit-sharing and pension plans during marriage that a spouse will receive after the marriage ends. Similarly, the traditional wife may have foregone a sizable buildup of profit-sharing and pension plans. This will be reflected in her contributions to the marriage under the career assets foregone entry, assuming that the buildup of such plans would have affected her income after the termination of the marriage.

Case 2: A "Put-Spouse-Through-School" Marriage—Husband as Student and Future Breadwinner, Wife as Temporary Breadwinner

KEY: _____ = actual real earnings path (path 1)
 - - - = real earnings path without marriage (path 2)
 . . . = real earnings path, marriage years removed (path 3)

Note: Dotted lines mark critical points in time — the date of marriage, the end of the marriage, the end of worklife expectancy, and the end of life expectancy.

Figure 3
 The Husband

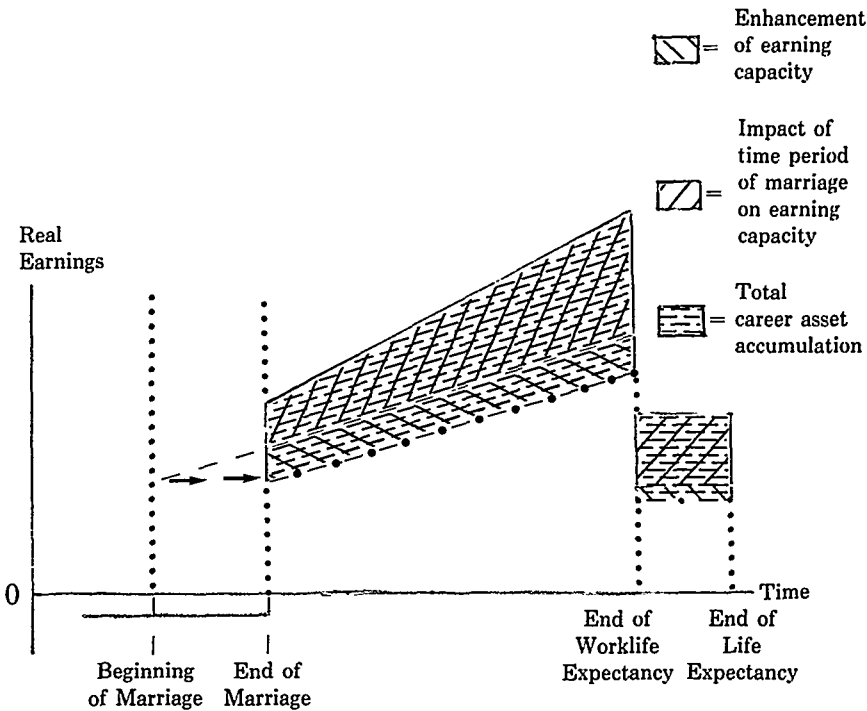


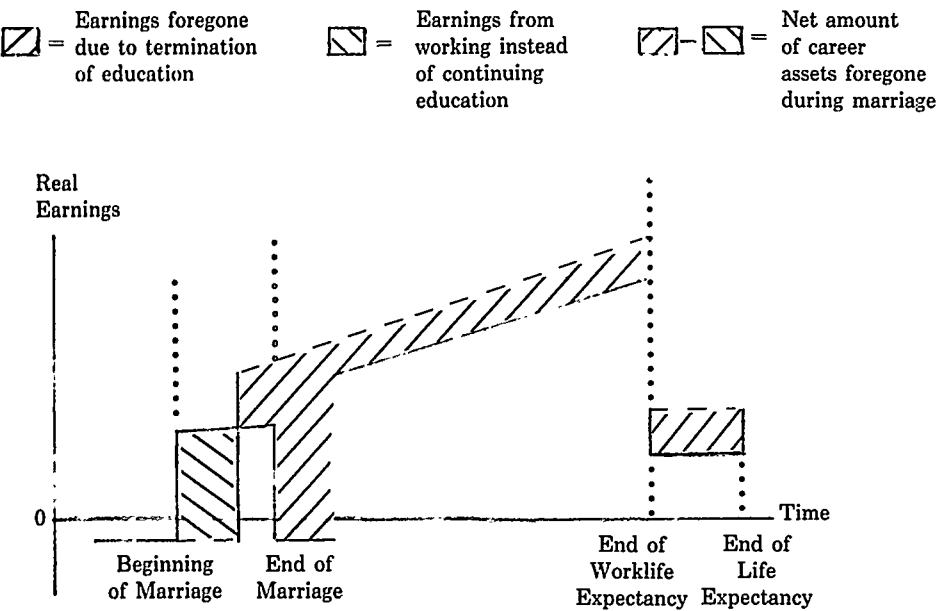
Figure 3 shows that the husband, a student prior to marriage, continues his education during the marriage and consequently has negative real earnings (zero income and direct educational expenses) while in school. The marriage ends just as he completes his education and secures employment. The wife's financial contributions to his education have enhanced his earnings capacity. Assuming he could not have afforded professional school without her financial support, his earnings path would have been lower for the remainder of his life expectancy (path 2 below path 1). If, however, he could have acquired the same education over the same amount of time had he remained single (i.e., without her help), then there would be no difference be-

The present value of the gap between paths 2 and 3 demonstrates the positive impact that the passage of time during the marriage has on his future earnings. To measure his total buildup of career assets during the marriage, simply combine the enhancement and passage-of-time impacts, which is the same as valuing the gap between paths 1 and 3.

KEY: — = actual real earnings path (path 1)
- - - = real earnings path without marriage (path 2)
- · - · = real earnings path, marriage years removed (path 3)

Note: Dotted lines mark critical points in time — the date of marriage, the end of the marriage, the end of worklife expectancy, the end of life expectancy.

Figure 4
The Wife



In figure 4 the wife graduates from college and marries immediately. She postpones or cancels plans for graduate or professional school and accepts a job to support herself and her husband while he attends professional school. The marriage terminates just as the husband completes his professional educa-

tion. The wife's best long-term option at that point is to leave her low-paying job and pursue her plans for graduate or professional school.

Over her lifetime, the wife's real earnings are lower than they would have been without the marriage and its commitments (path 1 is below path 2). Although her real earnings capacity increased during the marriage, it would have grown much faster had she had remained single. Thus, the present value of the gap between paths 1 and 2 enters table 2 as a measure of career assets that she has foregone. Note that table 2 calculates the present value from the date of the marriage to the end of her life expectancy. This is done because her foregone earnings are not accounted for anywhere else. Because she remained employed through the marriage, her direct and indirect contributions would reflect only her actual wage.

Paths 1 and 3 will be identical following the termination of the marriage, which indicates that the marriage years created no career assets of value in the wife's optimal post-marriage profession.

We now can combine the calculations in the modified framework (table 2) to summarize the impact of recognizing career assets in a marriage in which one spouse supports the other spouse-student. Adding the "career assets foregone" entry raises the wife's contribution entry. The amount of the husband's contribution rises (his direct contributions decrease by the amount of his direct educational expenses, but his positive career asset accumulation more than offsets this). The relative contributions of the two parties change. Again, the direction of change for the wife may be positive or negative, depending upon the particular situation. The marital property increases by an amount equal to the husband's career asset accumulation, and, as a result, the wife's equitable settlement increases in value.

Case 3: A Childless Modern Marriage

In this example, the marriage affects neither the husband's nor the wife's real earnings. As a result, figure 1 applies for each. For the husband, paths 1 and 2 are the same, and the present value of the gap between paths 1 and 3 enters table 2 as both a contribution by him and as marital property. The same is true for the wife.

If each party contributes to career asset accumulation in the same proportion as he contributes to marketable asset accumulation, the traditional analysis (table 1) yields the same settlement as table 2. In other words, one may ignore career assets in this circumstance without producing an inequitable settlement. Table 3 provides a hypothetical numerical example to illustrate this. When one adds the parties' respective career asset accumulations to their respective marketable asset awards from the traditional framework, the figures equal their property settlements under the modified framework.³⁶

TABLE 3

(a) The Traditional Framework

Economic Contributions

	Wife	Husband
Direct	\$70,000	\$100,000
Indirect	<u>\$7,000</u>	<u>\$10,000</u>
Total	<u>\$77,000</u>	<u>\$110,000</u>

Relative Contributions

$\$77,000/\$187,000 = 41.1765\%$ $\$110,000/\$187,000 = 58.8235\%$

Marital Property

Present Value of Marketable Assets = \$30,000

Equitable Distribution

$41.1765\% \text{ of } \$30,000 = \$12,352.94$ $58.8235\% \text{ of } \$30,000 = \$17,647.06$

36. $\$14,000 + \$12,352.94 = \$26,352.94$, and $\$20,000 + \$17,647.06 = \$37,647.06$.

(b) The Modified Framework

Economic Contributions

	Wife	Husband
Direct	\$70,000	\$100,000
Career Asset Accumulation	\$14,000	\$20,000
Indirect	\$7,000	\$10,000
Career Assets	<u>\$0</u>	<u>\$0</u>
Total	<u>\$91,000</u>	<u>\$130,000</u>

Relative Contributions

$\$91,000/\$221,000 = 41.1765\%$ $\$130,000/\$221,000 = 58.8235\%$

Marital Property

Present Value of Marketable Assets = \$30,000

Present Value of Career Assets = \$34,000

Total value of marital property = \$64,000

Equitable Distribution

$41.1765\% \text{ of } \$64,000 = \$26,352.94$ $58.8235\% \text{ of } \$64,000 = \$37,647.06$

Even in a childless modern marriage, however, it is necessary to consider the partner's career asset accumulations in order to reach an equitable settlement if either party devotes a greater percentage of his efforts to career asset accumulation than to marketable asset accumulation. Table 4 demonstrates this for a hypothetical case in which the wife chooses to work part-time and be a full-time student and the husband chooses to work full-time.

TABLE 4

(a) The Traditional Framework
Economic Contributions

	Wife	Husband
Direct	\$40,000	\$120,000
Indirect	<u>\$10,000</u>	<u>\$10,000</u>
Total	<u>\$50,000</u>	<u>\$130,000</u>

Relative Contributions

$$\$50,000/\$180,000 = 27.7778\%$$

$$\$130,000/\$180,000 = 72.2222\%$$

Marital Property

Present Value of Marketable Assets = \$30,000

Equitable Distribution

$$27.7778\% \text{ of } \$30,000 = \$8,333.33$$

$$72.2222\% \text{ of } \$30,000 = \$21,666.67$$

(b) The Modified Framework

Economic Contributions

	Wife	Husband
Direct	(\$40,000-\$10,000)=\$30,000	\$120,000
Career Asset Accumulation	\$100,000	\$60,000
Indirect	\$10,000	\$10,000
Career Assets Foregone	\$0	\$0
Total	<u>\$140,000</u>	<u>\$190,000</u>

Relative Contributions

$$\$140,000/\$330,000 = 42.4242\%$$

$$\$190,000/\$330,000 = 57.5758\%$$

Marital Property

Present Value of Marketable Assets = \$30,000

Present Value of Career Assets = \$160,000

Total Value of Marital Property = \$190,000

Equitable Distribution

$$42.4242\% \text{ of } \$190,000 = \$80,606.06$$

$$57.5758\% \text{ of } \$190,000 = \$109,393.94$$

Using the traditional analysis of part (a) of table 4, the wife would receive \$8,333.33 in marketable assets plus her \$100,000 career asset buildup for a total of \$108,333.33. The problem with this result is that his higher earnings were responsible for all the accumulation of marketable assets and may have subsidized her consumption expenditures as well, unless, of course, her consumption expenditures were tiny in relation to his. While she leaves the marriage with all her career assets and part of the marketable assets, he gets less than half the assets, but contributed more than half to the marriage. The recognition of career assets in part (b) of table 4 corrects this result.³⁷

V. THE ROLE OF RELATIVE ECONOMIC CONTRIBUTIONS ANALYSIS IN ARRIVING AT AN EQUITABLE APPORTIONMENT

This Article has demonstrated how the relative economic contributions analysis applies to the three different types of marriages discussed above. One can envision countless other marital circumstances, but the analysis remains the same. Only the shapes and lengths of the earnings paths will change. Those changes will reflect the new data in each case.

To establish proof of the three earnings paths, it is important to specify the data one uses to chart them. That data includes the date of marriage; the date of divorce; age and remaining worklife expectancy, which includes any modifications that are appropriate in view of this spouse's health considerations; life expectancy, which also includes any appropriate health considerations; educational level; dates and terms of previous employment; previous earnings; and future employment and earnings prospects, with consideration given to the spouse's health, education, age, and capabilities. If the relative contributions framework recognizes career assets, it incorporates into its measurement of contributions more than half of the specific factors

37. Actually, the validity of this claim depends upon a public policy determination of what is an "equitable" settlement. South Carolina law contains no explicit definition of this term. For present purposes the authors will assume that an equitable settlement is one in which each spouse shares in the marital assets according to his relative contribution to their accumulation. Obviously, the parties and the court must also consider other factors, such as fault, custody, and child support. This approach deals only with measuring contributions, with fair consideration given to all kinds of determinable contributions.

that the court must consider under South Carolina's equitable apportionment legislation.

One does not consider fault, nonmarital property, child custody arrangements and their impact on treatment of the family home, and the existing support obligations of either spouse within this framework. The relative economic contributions framework indicates the property settlement due to each spouse in view of his relative contribution to the accumulation of property by the marital partnership. It is not intended as a final settlement prescription. Courts should recognize noneconomic considerations such as fault and child custody in modifying the settlement prescribed within the relative contributions framework.

VI. ADDITIONAL CONSIDERATIONS IN AN EQUITABLE SETTLEMENT

In some cases, including career assets as property will require the court to establish provisions for one partner to receive compensation from the other in the future. The spouse with a large accumulation of career assets may not have adequate marketable assets to provide lump-sum compensation to the spouse who lacks significant career assets at divorce.³⁸ In this instance, the court may establish a future payment schedule to equal, in present value, the amount due the partner. Alternatively, the courts may use income projections to arrive at an award calculated as a percentage of future annual earnings. The latter approach is appealing because payments to the partner reflect unanticipated income fluctuations. Because such a settlement provides an incentive to conceal income it probably is not advisable.

Requiring one spouse to make monthly payments to the other as a part of an equitable property settlement is preferable to awarding alimony in at least two very important ways.³⁹ First, a property settlement, even if it calls for monthly payments, does not constitute a restraint on the freedom of the spouse re-

38. See L. WEITZMAN, *supra* note 4, at 54-61 (providing data which indicate that such assets are limited in the typical divorce case).

39. The argument that truly equitable property settlements should replace alimony in part or in full is not new. See, e.g., Note, *Treating Professional Goodwill as Marital Property in Equitable Distribution States*, 58 N.Y.U. L. Rev. 554, 559-60 (1983).

ceiving the funds to remarry. A property settlement, unlike alimony, recognizes that the spouse receiving the payments deserves them for her contributions to the marriage and that they should not be contingent upon marital status.⁴⁰

Second, a property settlement, unlike alimony payments, is final and not subject to revision in the future if the economic circumstances of either party change. Alimony makes the financial position of the spouse who receives it dependent upon factors beyond her control, such as her spouse's decisions regarding remarriage and more children. A property settlement requires the spouse making payments to fulfill that obligation whether or not he chooses to assume new obligations.

Third, depending, to an extent, upon the will of the parties, a property rights settlement will not be taxable to the payee nor deductible to the payor.⁴¹

A. *A Word About Alimony*

The authors have noted already that proper equitable distribution awards should obviate the need for alimony.⁴² We be-

40. *Reiss v. Reiss*, 195 N.J. Super. 150, 478 A.2d 441 (1984), is noteworthy because in that case the court compensated the wife for her contribution by awarding her "reimbursement alimony" rather than conventional alimony. In so doing, the court noted that conventional alimony was not appropriate because "it 'would force [the spouse] to forego marriage and perhaps even be celibate for many years simply to realize a return on her investment and sacrifices.'" *Id.* at 158, 478 A.2d at 444 (quoting *Hubbard v. Hubbard*, 603 P.2d 747, 752 (Okla. 1979)). Therefore, the court awarded "reimbursement alimony" to avoid the contingencies of conventional alimony. In effect, "reimbursement alimony" is not distinguishable from a property settlement that requires structured payments in the future.

41. There may be tax advantages to both parties in having a property division treated as an alimony payment because this approach shifts the burden of paying federal income taxes on that money from the alimony payor to the recipient. If the payor is in a higher tax bracket than the recipient, the *couple* will have more after-tax dollars to divide between them than they would have if the monies were deductible at the lower rate of the recipient. For the arrangement to be beneficial to the recipient, the parties, of course, would have to share these tax savings. See I.R.C. § 71(b)(1), (2), (c)(1), (2) (West Spec. Pamphlet 1987). Note that a true property division treatment of these matters would require an adjustment to the capital asset accumulation figure (appearing under the contributions category) to account for income taxes due. The testifying expert should be able to take this into account since it would only require him to subtract the income taxes due from each of the three earnings streams that he would use in computing that accumulation. Note also that the adjustment should have only a small impact on the capital asset accumulation figure, unless the gap between the earnings streams is large.

42. See *supra* note 41.

lieve this result to be desirable. Alimony is an outmoded welfare concept that assumes that men are socially responsible for their wives because women are, by nature or by some other dictate, incapable of self-support. A spouse's inability to support herself, however, has little to do with being female, and, instead, has more to do with the different roles the parties played during the marriage. Men in the same situations would also find it difficult to support themselves. Courts should only require the divorced spouse, whether male or female, to be responsible for adequate child support, and an equitable property settlement, which fully recognizes and includes career assets as property. Anything beyond that constitutes a disproportionate social welfare tax on the divorced men and women who pay alimony. Of course, until the courts apply an approach such as the one suggested here, some spouses, particularly those who have been in long-term traditional marriages, will need alimony.

The precise composition of the assets that a court should award to each party is an issue that this Article does not address. Assuming a court properly values the marital property, the two partners should be concerned primarily with the dollar value of the assets received rather than their identity. Barring emotional attachment to certain assets, there should be strong feelings about who gets which assets only when the sale of an asset or the purchase of a similar involve high transaction costs. The sale or purchase of tangible property and business interests often involve these transaction costs and this fact should influence the distribution of marketable assets in the settlement. This Article does not address the issues associated with the proper distribution of marital property upon divorce. Instead, this Article is only concerned with how to decide the total dollar value of marital property that should go to each party.⁴³

VII. CONCLUSION

Failure to acknowledge career assets as marital property

43. L. WEITZMAN, *supra* note 4, at 78-96, suggests that who gets the house is a particularly important issue for the psychological well being of the wife and children. Courts in South Carolina have recognized specifically the significance of this issue. *See* R. CHASTAIN, *supra* note 17, at 82; *see also id.* at 52-54 (Temp. Supp. 1986). Overall, the supreme court has made it clear that any equitable mechanism may be used to decide the allocation of marital property. *See, e.g.,* Bowyer v. Sohn, 290 S.C. 249, 349 S.E.2d 403 (1986).

when deciding what constitutes an equitable apportionment of that property penalizes spouses who have devoted most of their time to family duties instead of developing marketable skills. South Carolina courts, at least in part, have compensated for this inequity by awarding alimony to those spouses. The attitude that alimony is a social obligation of spouses able to pay rather than a part of an equitable property settlement, which is reflected by the contingencies courts place on alimony awards, makes alimony a poor substitute for a truly equitable property settlement.

If the courts recognize the value of career assets accumulated during marriage as marital property and correctly value that property, alimony payments following divorce will be neither necessary nor appropriate. Correct valuation of career assets accumulated is not simple. It requires that both spouses provide the court with earnings and educational histories over the course of the marriage; it requires some "speculation" regarding future earnings prospects;⁴⁴ and the necessary computations are time consuming. Courts, however, routinely admit such valuations into evidence in other kinds of cases, notably, personal injury cases. They are equally essential in divorce cases, particularly those involving long-term, traditional sex role marriages or those in which the wife has supported a student-husband. Valuation difficulties are a poor excuse for the inequities that result when courts ignore career asset accumulations in distributing marital property upon divorce.

Further, recognition of career asset accumulations during marriage does not make it necessary for the court to value or divide professional degrees, licenses, practices, or goodwill. Since future earnings projections will reflect these assets, courts should not value them individually. Courts should consider the

44. This does not require any more "speculation" than that required under the recent "rehabilitative alimony" decisions of the South Carolina Supreme Court and Court of Appeals. For example, in *Canady v. Canady*, 289 S.C. 512, 347 S.E.2d 115 (Ct. App. 1986), the court of appeals wrote that "[a]n award of rehabilitative alimony must be based on facts which . . . demonstrate the recipient's self-sufficiency at the expiration date of the ordered payments." *Id.* at 515-516, 347 S.E.2d at 117 (emphasis added). The *Canady* court essentially echoed the South Carolina Supreme Court in *Herring v. Herring*, 286 S.C. 447, 335 S.E.2d 366 (1985), in which the court stated that "the record must demonstrate the self-sufficiency of the recipient at the expiration date of ordered payments." *Id.* at 451, 335 S.E.2d at 368 (emphasis added).

overall impact of the marital years on earnings capacity as a part of marital property. As long as courts define earnings broadly to include income from various fringe benefit programs, the problem of how to handle career assets is reduced to recognizing the impact of a period of marriage on the future earnings capacities of the two parties within the relative economic contributions framework described above.

Until the law in South Carolina and in other states fully accounts for career assets in property settlements, women who wish to be homemakers should be aware that courts in divorce actions do not yet reward the decision to forego career opportunities. Upon divorce, a woman (or a man) who makes this decision usually will find herself, at best, reliant upon alimony, with its associated uncertainties and restrictions. At worst, she will have a significantly reduced standard of living because of her impaired earnings capacity for which present equitable distribution approaches do not adequately compensate.⁴⁵ The authors believe that the approaches to equitable distribution of marital property suggested herein could help remedy the inadequacies of the present approach and lend greater predictability and respectability to the legal system in this area.

45. Those analyzing property settlements under no-fault laws in states such as California make this same argument, perhaps even more strongly. See L. WEITZMAN, *supra* note 4, at 372; Beninger & Smith, *supra* note 26, at 216-17.